IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
BUTLER COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

VON CLARK DAVIS

Defendant-Appellant

CASE NO. CA84-06-071

BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF THE CASE

Procedural Posture:

This is an appeal from the judgment of conviction and sentence of death as to defendant-appellant Von Clark Davis for the offense of Aggravated Murder in violation of R.C. 2903.01(A) with a Specification of a prior conviction for second-degree murder under R.C. 2929.04(A)(5), a firearm specification under R.C. 2929.71, and also Having Weapon While Under Disability in violation of R.C. 2923.13(A)(2), in the Common Pleas Court of Butler County, Ohio.

Defendant-Appellant was indicted in January, 1984, for the shooting death of Suzette Butler on December 12, 1983. He was arrested by the police in Louisville, Kentucky on December 14, 1983, and was afforded a preliminary hearing on the charges in Hamilton Municipal Court on December 21, 1983. (T.d. 1)

A number of pretrial motions were heard on February 15, 1984, and with the defendant waiving his right to a speedy trial, the trial was scheduled for May 9, 1984. (T.d. 42) Additional pretrial motions were thereafter filed and overruled by the trial court, Judge Henry J. Bruewer presiding,by entry filed May 4, 1984. (T.d. 88)

On May 8, 1984, defendant-appellant in open court made a written waiver of jury trial and election to be tried by a three-judge panel under R.C. 2945.06. On May 9, 1984, trial commenced before Judges Bruewer, William R. Stitsinger and John R. Moser of the Common Pleas Court of Butler County, General Trial Division. On May 11, 1984, the

three-judge panel unanimously found the defendant-appellant guilty of Aggravated Murder with Specification of prior conviction and with Specification of a firearm, and guilty as to Having Weapon While Under Disability.

On May 29, 1984, a sentencing hearing was conducted, and the court imposed a sentence of death by electrocution as to Aggravated Murder, a term of three years actual incarceration as to the firearm specification and a term of one and one-half years as to the weapon under disability offense. (T.d. 106)

Statement of Facts:

On December 12, 1983, at approximately 7:30 p.m., the Hamilton Police Department and the Butler County Coroner responded to a shooting outside of the American Legion Hall located at 727 Central Avenue in the City of Hamilton, Butler County, Ohio. (T.p. 12 and 25) Laying approximately six feet from the front door on the pavement was the deceased body of a young black girl identified as Suzette Butler. (T.p. 25) A subsequent autopsy performed at the direction of the coroner's office revealed Suzette Butler died of multiple gunshot wounds to the head; and also revealed that she sustained four closely placed gunshot wounds to the left side of her head. (T.p. 13-17) An expert criminalist from the Bureau of Criminal Identification concluded that the four .25 caliber automatic bullets removed from the victim's head were fired from the same firearm. (T.p. 44) The same expert further concluded that four shell casings found at the scene of the shooting were all .25 auto

caliber cartridge cases of PMC brand, and that these same four casings had been chambered in the barrel of the same weapon. (T.p. 45) The expert witness also concluded that one gunshot wound to the victim in which there was stippling present was fired from a distance two to six inches from the head of Suzette Butler. (T.p. 48)

Mark Lovette and Wade Coleman testified that the afternoon of this murder, the defendant Von Clark Davis sought out Mark Lovette from Gabe's Cafe, and requested Lovette purchase a hand gun for him at Gil's Pawn Shop located in Hamilton. Lovette went to the pawn shop and purchased a Raven P25 automatic hand gun for $49.50, which he turned over to the Defendant. (T.p. 60 and 91) Lovette was dropped off at Gabe's, and subsequently the defendant came back, picked Lovette up again, and took him to a K-Mart store to purchase bullets for the firearm. (T.p.81) After the purchase of bullets Lovette was returned again to Gabe's. Subsequently, on a third occasion, that afternoon the defendant and Coleman picked Lovette up from Gabe's and again asked him to purchase more bullets on behalf of the defendant because those purchased at K-Mart did not fit the firearm. (T.p. 81) At that point, the defendant took Lovette and Coleman to Butler County Gun, a Fairfield gun store. Lovette and Coleman entered the store with a gun clip for a P25 Raven automatic, and the clerk sold one box of PMC brand .25 automatic bullets. (T.p. 89 and 96) In the presence of both Lovette and Coleman, the defendant loaded the newly purchased .25 caliber Raven automatic with four or five PMC brand bullets purchased only a couple hours before the death of Suzette Butler. (T.p. 84)

At approximately 5:30 p.m., Mona Aldridge, a close friend of the victim, and the victim arrived together at the American Legion at which Suzette Butler was murdered. Ms. Butler left the American Legion for a period of time to drop off her daughter, and subsequently returned alone. Five minutes later, the defendant also arrived. (T.p. 106) After a conversation between the defendant and victim at a table inside the bar, they both walked outside the door. Suzette Butler told Ms. Aldridge she would be right back, and left her jacket, drink and cigarettes on the table where she was sitting. (T.p. 108) A short time afterwards, Ms. Aldridge became concerned and went to the outside door to check on her friend. Upon opening the door she observed the defendant pointing a gun at the head of the victim. (T.p. 108)

Ms. Aldridge immediately turned back to look for help, and someone came in the door behind her and said someone was shot. (T.p. 109)

Cozette Massey and Reginald Denmark both testified that on the night of Suzette Butler's murder they were walking down Central Avenue toward the American Legion Hall when they observed the defendant, Von Clark Davis, shoot Suzette Butler several times in the head. Both witnesses identified in court the defendant as the person who shot the victim, and both testified that the defendant, after firing several shots, bent over the body of the victim and fired the last shot into the head of the victim at point blank range. (T.p. 136-138, 168) Both witnesses testified that after the shooting, the defendant crossed the street, got into an automobile which was identified as belonging to the defendant and drove away. (T.p. 31, 138, 170) Both parties indicated that the

time of shooting was between 7:15 and 7:30 p.m. (T.p. 136, 166)

It was stipulated between all parties that the defendant, Von Clark Davis, was previously convicted in 1971 in Butler County Case No. 21655 of Second Degree Murder, an element of which is the purposeful killing of another, and in Butler County Case No. 20938 of Shooting with Intent to Wound in 1970. At the time the defendant murdered Suzette Butler, he was on parole for the murder of his wife in 1970.

Thereafter, the three judge panel found the defendant guilty of aggravated murder and guilty of all specifications charged in the Indictment, including the specification of previously having been found guilty of a purposeful killing of another. The defendant was also found guilty of having a gun while under a disability.

A mitigation hearing was held two days later. After long and careful consideration, the defendant, Von Clark Davis, was sentenced to death in the electric chair.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY OVERRULING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS THE DEATH PENALTY SPECIFICATION ON CONSTITUTIONAL GROUNDS.

Issues Presented for Review and Argument:

1. Ohio's statutory framework for imposition of capital punishment, Ohio Revised Code Sections 2929.02 through 2929.04, as adopted by the General Assembly effective October 19, 1981, does not violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution.

In State v. Jenkins (1984), 15 Ohio St. 3d 164, ___NE 2d ___, the Ohio Supreme Court thoroughly discussed and rejected all general claims that the Ohio death penalty scheme was unconstitutional on its face in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution or Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

Appellant's first issue herein challenging the imposition of capital punishment as failing to be the "least restrictive means" to achieve the societal interest of deterrence and incapacitation, (i.e., life imprisonment), was rejected in Jenkins, id. at pages 167-168, for the reasons established in Gregg v. Georgia (1976), 428 U.S. 153; appellant's argument is predicated solely on societal protection, while the Supreme Court has recognized that the death penalty, as a sanction or punishment from the aspect of societal retribution, is proper in extreme cases. Gregg, id. at 184; Jenkins, id. at 168.

Appellant's second issue under his first assignment of error attacks capital punishment in any case as cruel and unusual punishment. The Court in Jenkins, id. at pages 168-169, rejected that argument on the basis of Gregg v. Georgia, supra, and its companion cases.

Appellant's third issue complains of the death penalty in general as a denial of equal protection of the laws, claiming that it is inevitably administered and applied in an arbitrary and capricious fashion. The courts in both Jenkins, id. at 169-170, Gregg, id. at 226, recognized that this argument represents an indictment of our entire criminal justice system which must be constitutionally rejected.

Under Ohio Revised Code Sections 2903.01 and 2929.02-.05, the discretion of the sentencing authority is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" in imposing the sentence. See Zant v. Stephens (1983), ___ U.S. ___, 77 L. Ed 2d 235, at 248. The inevitable degree of discretion exercised by prosecutors in the charging process, as viewed by the Court, does not cause the system to be standardless any more than decisions which are made by juries; further, the Court found it unlikely that prosecutors would fail to prosecute, as capital cases, those cases which are truly "similar" in relevant respects. Gregg, id. at 225, quoted in State v. Jenkins, id at 170.

2. The standard of proof beyond a reasonable doubt as defined in Ohio Revised Code Section 2901.05 is applicable in a capital prosecution and is constitutional.

In the fourth issue briefed by appellant under his first assignment of error, he contends that Ohio's definition of reasonable doubt as provided in R.C. 2901.05 is "constitutionally unfirm [sic]."

Similar arguments attacking the statutory definition of reasonable doubt have been rejected by the Ohio Supreme Court in two cases decided under the 1974 law: State v. Cotton (1978), 56 Ohio St. 2d 8, 13, 381 NE 2d 190 at 194, and State v. Nabozny (1978), 54 Ohio St. 2d 195, 202-203, 375 NE 2d 784, 790-791. Appellant's argument that a "proof beyond all doubt" standard should apply to capital prosecutions was recently rejected by the Ohio Supreme Court in State v. Jenkins (1984), 15 Ohio St. 3d 164, ___NE 2d ___, paragraph eight of syllabus.

3. The trial of aggravating circumstances in the guilt phase of a capital trial as provided by Ohio Revised Code Section 2929.03 does not violate any provision of the United States or Ohio Constitution.

In his fifth issue under this first assignment of error, appellant maintains that by requiring proof of aggravating circumstances at the guilt phase of trial, he is deprived of an impartial jury on the issue of his guilt. However, this identical argument was rejected by the Ohio Supreme Court in State v. Jenkins (1984), 15 Ohio St. 3d 164, at pages 173-174, where the court reasoned that Ohio's system is akin to the Texas procedure which was upheld in Jurek v. Texas (1976), 428 U.S. 262, which differs from the Georgia and Florida procedures in requiring consideration at the guilt phase whether the crime falls into a particular category justifying capital punishment. The court was unconcerned whether the aggravating circumstances are proven at the guilt or penalty phase, as

long as factors in mitigation are considered at the penalty phase. Jurek, id. at 271.

Further, the Ohio Supreme Court noted that although the U.S. Supreme Court has endorsed bifurcated proceedings in capital cases, the Court has yet to suggest a constitutional requirement of bifurcation. Jenkins, id. at 174, n. 11. In the last decision to deal with this issue, the U.S. Supreme Court held in Crampton v. Ohio, sub nom. McGautha v. California (1971), 402 U.S. 183, 208-213, that bifurcation was not constitutionally mandated.

4. The trial of issues of guilt and penalty in a bifurcated proceeding before the same trier of fact, as provided by Ohio Revised Code Sections 2929.03-.04, does not violate the Sixth or Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution.

The Ohio Supreme Court in State v. Jenkins, id. at pages 173-174, n. 11, rejected appellant's sixth argument under this assignment of error which complains that the single-jury procedure in these bifurcated proceedings deprives a defendant of an impartial jury and fair trial at the sentencing stage.

In the case at bar, it is first to be noted that appellant waived a jury trial and was tried by a three-judge panel; the Sixth Amendment jury trial implications are thus not reviewable herein. See Luce v. United States (Dec. 10, 1984), ___U.S. ___, 36 Cr. L. Rptr. 3001. Further, the notion that two juries are constitutionally mandated for the bifurcated proceedings has never even remotely been suggested in the Supreme Court's prior decisions, Jenkins, id. at 174, n. 11. Last, the appellant's

suggestion that he has a "right" to present irreconcilable and inconsistent defenses does not seem to be truly compatible with the concept of "fair trial" embodied in the Due Process Clause of the Fourteenth Amendment. This argument fails particularly in light of Section 2929.03(D)(2), which explicitly requires "consideration of the relevant evidence raised at trial" in the sentencing deliberation process.

5. Where the accused in a capital case waives a jury trial and elects to be tried by a three-judge panel pursuant to Ohio Revised Code Section 2945.06, any pretrial rulings as to jury selection procedures are moot and unreviewable; further, Ohio Revised Code Section 2945.25(C)'s challenge for cause of Witherspoon - excludable jurors is constitutional.

Appellant's issue as to the so-called "death qualification" of prospective jurors in capital cases (briefed as his seventh argument under the first assignment of error) is not reviewable in this case, because appellant was tried by a three-judge panel rather than a jury. The trial court's ruling on a motion in limine regarding this issue became moot when appellant waived a jury trial. See Luce v. United States (Dec. 10, 1984), ___U.S.___, 36 Cr. L. Rptr. 3001, (holding that a district court's in limine ruling permitting impeachment by a prior conviction is not reviewable where a defendant did not testify at trial; the reviewing court is not required to speculate as to the defendant's motivation not to testify.) Courts are without power to decide questions that cannot affect the litigants before them. See DeFunis v. Odegaard(1974), 416 U.S. 312, 316.

Appellant's argument as to jury selection is otherwise not well

taken on the merits. In State v. Jenkins (1984), 15 Ohio St. 3d 164, ___NE 2d ___, the Ohio Supreme Court held in paragraph two of the syllabus:

> To death-qualify a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury.

The Court reasoned that the decision in Witherspoon v. Illinois (1968), 391 U.S. 510, expressly permits the exclusion for cause of jurors who make it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Id. at 522-523, n. 21. Thus, the Court reasoned that jurors subject to challenge under Witherspoon because they refuse to follow the law not only renders a jury impartial for the penalty phase but also for the guilt phase of trial as well.

The Ohio statute providing for challenge for cause of such jurors, Ohio Revised Code Section 2945.25(C), was upheld in Lockett v. Ohio (1978), 438 U.S. 586, 595-597, part II-B of the opinion; in Lockett, the Court noted that there is nothing in its prior decisions which suggests that a capital defendant has a "right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." 438 U.S. at 596-597.

6. Ohio's statutory capital punishment procedure places the burden of proof in the penalty phase of trial upon the prosecution by proof beyond a reasonable doubt, and absent such proof the death penalty

is precluded, pursuant to Ohio Revised Code Section 2929.03(D)(2).

Although appellant claims in his eighth argument herein that Ohio's death penalty scheme does not identify who bears the burden of proof or define what standard of proof is borne, the Court in State v. Jenkins, id. at pages 171-173, ruled that an examination of the pertinent statutory provisions demonstrates that the statute does indeed provide the direction that appellant claims is lacking.

First, the concept of weighing aggravating circumstances proved beyond a reasonable doubt against any existing mitigating factors was approved in Proffitt v. Florida (1976), 428 U.S. 242, and its validity continues today. See Barclay v. Florida (1983), ___U.S.___, 77 L. Ed 2d 1134. The Ohio procedure first requires proof of one or more aggravating circumstances at the guilt phase by proof beyond a reasonable doubt, and the burden is on the prosecution, R.C. 2929.04(A). Next, in the penalty phase, the burden of proof is again on the prosecution, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh any mitigating factors present in the case, see R.C. 2929.03(D)(2) and (3). The defendant is given great latitude in the presentation of evidence of any factors relevant to mitigation, see R.C. 2929.04(C). This statute clearly imposes the risk of non-persuasion upon the prosecution in both guilt and penalty phases, and by an articulable standard.

Appellant's argument (without citation to legal authority) that the state should be constitutionally required to prove the absence of mitigating factors was rejected in State v. Jenkins, id. at 171. The

Court reasoned that the statute explicitly places the burden of going forward with evidence of any factors in mitigation of the death penalty, see R.C. 2929.03(D)(1), and the Court further held that the defendant bears a burden of proving mitigating factors by a preponderance of the evidence. Jenkins, id. at page 171. This is no different from the rule regarding affirmative defenses, see R.C. 2901.05(A), which has been held not to violate the defendant's constitutional rights, see State v. Howze (1979), 66 Ohio App. 2d 41, 420 NE 2d 131, and Patterson v. New York (1977), 432 U.S. 197.

7. Ohio's statutory capital punishment procedure permits the consideration in the penalty phase, as a mitigating factor of any aspect of a defendant's character or record, any of the circumstances of the offense, and any other factors relevant to the issue of whether the defendant should be sentenced to death, pursuant to Ohio Revised Code Sections 2929.03 - .04.

The ninth argument of appellant herein maintains that Ohio's death penalty scheme is flawed by failing to afford the sentencing authority the option to impose a sentence of life imprisonment, (i.e., grant mercy), regardless of whether aggravating circumstances outweigh factors in mitigation of the death penalty. As noted by the Court in State v. Jenkins, id. at page 178, this argument seizes upon the language of Justice Stevens' concurring opinion in Barclay v. Florida, supra, at 1153. However, the Ohio Supreme Court in Jenkins noted that Ohio's system presently coincides with Justice Stevens' alternative scheme, to require the sentencing authority to consider and weigh "any other factors relevant" in mitigation, under R.C. 2929.04(B)(7) and (C), by which the

defendant is given great latitude.

Thus, State v. Jenkins, id. at pages 178-179, rejects this argument.

8. The specification pursuant to Ohio Revised Code Section 2929.04(A)(5) that prior to the offense at bar, the offender was convicted of another offense an element of which was the purposeful killing of another, is neither vague nor overbroad and provides a clear, objective and principled basis for distinguishing a capital case from non-capital cases.

The tenth and final issue presented under this first assignment of error claims that the Ohio scheme does not adequately channel the sentencing authority's discretion by clear and objective standards, citing the decision in Godfrey v. Georgia (1980), 446 U.S. 420. In Godfrey, the Supreme Court held that Georgia's statutory aggravating circumstance that a murder was "outrageously or wantonly vile, horrible or inhuman" was unconstitutionally vague. The plurality decision concluded that almost every murder would be capable of such characterization by a person of ordinary sensibility, and thus failed to provide a principled way to distinguish a case in which the death penalty is imposed from the many cases in which it is not. Id. at 433.

Unlike the situation in Godfrey, the "repeat murder" specification under R.C. 2929.04(A)(5) in the case at bar is defined in clear, specific, objective terms. Proof of this aggravating circumstance requires: (1) a prior offense; (2) a prior conviction (and thus proof beyond a reasonable doubt in the past); (3) the prior killing of another (in an unrelated homicide); and (4) the prior killing must have been purposeful, as an essential element of the offense. This specification leaves nothing to guesswork.

Under Ohio's repeat murder specification, the sentencing authority's discretion is "suitably directed and limited as to minimize the risk of wholly arbitrary and capricious action" in imposing the sentence. Zant v. Stephens (1983), ___U.S.___, 77 L. Ed. 2d 235 at 248. It meets the necessity of "genuinely narrow[ing] the class of persons eligible for the death penalty," id. at 249, while requiring "objective consideration of the particularized circumstances of the individual offense and the individual offender," Jurek v. Texas, supra at 273-274.

On three occasions since Gregg, the Court has expressly reserved as an open question whether a state may provide for a mandatory death sentence upon proof of certain categories of capital murder such as murder by a prisoner or escapee serving a life sentence or murder by a person previously convicted of an unrelated murder. See Roberts (Stanislaus)v. Louisiana (1976), 428 U.S. 325, 334 n. 9: Roberts (Harry) v. Louisiana (1977), 431 U.S. 633, 635 n. 2; and Lockett v. Ohio (1978), 438 U.S. 586, 604 n. 11. The Roberts cases explained in a footnote that mandatory death sentences may be permissible in these categories, because the capital crime itself in these instances is defined in significant part in terms of the character or record of the individual offender. In the Lockett decision, while striking down Ohio's former death penalty scheme on grounds that it lacked sufficient consideration of mitigating factors, the Court opined that the "rarest kind of case" (such as the case at bar) may justify a mandatory death sentence on the ground of deterrence.

Thus, if it is arguable that a mandatory death sentence is justifiable for this category of capital murder, then the Ohio procedure, reformed in the wake of Lockett v. Ohio to require full consideration of any relevant mitigating factors in all categories of capital murder, will certainly pass constitutional muster.

Defendant-Appellant's First Assignment of Error should be overruled in all its particulars.

II. THE DEFENDANT-APPELLANT'S MOTION TO DISMISS OR INSPECT GRAND JURY TRANSCRIPT WAS PROPERLY OVERRULED.

Issue Presented for Review and Argument:

> *A defendant is not generally entitled to inspect the grand jury proceedings; and since an indictment valid on its face is not subject to challenge on the basis of inadequate or improper evidence before the grand jury, the motion for inspection in this case fails to demonstrate a "particularized need" for disclosure.*

It is well-settled that "the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." United States v. Calandra (1974), 414 U.S. 338, 344-345, (holding that the exclusionary rule on illegally obtained evidence is not applicable to grand jury proceedings). See also Costello v. United States (1956), 350 U.S. 359 (holding that an indictment is not subject to challenge on the ground that hearsay evidence was presented to the grand jury); Holt v. United States (1910), 218 U.S. 245 (denying the right to challenge an indictment on the ground that evidence before the grand jury was insufficient); and Lawn v. United States (1958), 355 U.S. 339, 348-350.

The Supreme Court reasoned in the Costello decision:

> [I]n this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. . . .
>
> . . . If indictments were to be held open to challenge on the ground that there was inadequate

> or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. . . .
>
> . . . No. persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change.

350 U.S. at pages 362-364.

Thus, the underlying assumption made by appellant herein is faulty; he has no basis to challenge the indictment, and therefore no legitimate reason for inspection of the grand jury proceedings.

A defendant is not generally entitled to inspect the grand jury proceedings. State v. Laskey (1970), 21 Ohio St. 2d 187, 191, 257 NE 2d 65. Only upon a showing of "particularized need" for pretrial inspection may the trial court permit such inspection. Ohio has held that disclosure of grand jury testimony, other than that of a defendant or codefendant under Criminal Rule 16(B) discovery provisions, is not required but is strictly controlled under Criminal Rule 6(E), and the release of any such testimony for use prior to or during trial is within the discretion of the trial court. State v. Greer (1981), 66 Ohio St. 2d 139, 420 NE 2d 982, syllabus paragraph one. Grand jury proceedings are secret, and an accused is not entitled to inspection except upon a showing by the defense that a particularized need for disclosure exists which outweighs

the need for secrecy. Id., syllabus paragraph two.

A mere statement that the grand jury transcript may be "material to the defense," or an allegation of "possible defects" in proceedings before the grand jury, is not sufficient for a defendant to obtain the grand jury minutes; unless an accused presents specific reasons for suspecting errors in the grand jury proceedings, and thus demonstrates a particularized need, his motion should be denied. State v. Cooper (1977), 52 Ohio St. 2d 163, 370 NE 2d 725; State v. Morris (1975), 42 Ohio St. 2d 307, 329 NE 2d 85.

The only such grounds for a motion to dismiss the indictment are set forth in Criminal Rule 6(B)(2), being objections to the array or lack of legal qualification of an individual juror. Neither are alleged in appellant's pretrial motion, and as set forth above, appellant's motion to dismiss on the grounds of hearsay, illegally obtained evidence or lack of sufficient evidence at the grand jury was not well taken as a matter of law. United States v. Calandra, supra, and Costello v. United States, supra. Appellant's second assignment of error is therefore not well taken and should be overruled.

III. THE TRIAL COURT PROPERLY OVERRULED THE DEFENDANT-APPELLANT'S MOTION TO SEVER THE TWO COUNTS OF THE INDICTMENT.

Issue Presented for Review and Argument:

> *Where the offense of Aggravated Murder with specification of a prior conviction for a purposeful killing is properly joined in an indictment also charging the offense of having a weapon while under disability alleging the same prior conviction, the trial of both offenses in a single proceeding before a three-judge panel does not constitute error prejudicial to the rights of the accused.*

The joinder of Counts One and Two of this Indictment is proper under Criminal Rule 8(A), which permits the joinder of offenses based on the same occurrence or series of events connected together. Criminal Rule 8(A) provides in pertinent part:

> Two or more offenses may be charged in the same indictment . . . in a separate count for each offense if the offenses charged . . . are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

In the case at bar, the defendant's acts of acquiring, having and using a firearm constituted the evidence which would prove the purposeful murder with prior calculation and design, as well as constituting the elements of the weapons offense. Likewise, the prior conviction for second-degree murder in 1971 was the proof necessary to sustain the specification to count one, as well as being the element of "disability" in count two. Thus, the two offenses were interrelated and overlapping with respect to the evidence.

Where there is an original joinder of two counts in one indictment, a defendant must bear the burden of affirmatively showing prejudice and abuse of discretion when claiming under Criminal Rule 14 that separate trials of multiple charges should be allowed. State v. Roberts (1980), 62 Ohio St. 2d 170, 175, 405 NE 2d 247; State v. Torres (1981), 66 Ohio St. 2d 340, 421 NE 2d 1288, syllabus. The trial court has discretion in ruling on a motion to sever counts; joinder and the avoidance of multiple trials is favored for many reasons, among which are conserving time and expense, diminishing the inconvenience to witnesses and minimizing the possibility of incongruous results in successive trials before different juries. State v. Torres, id.

In State v. Dunkins (1983), 10 Ohio App. 3d 72, 460 NE 2d 688, the Court of Appeals of Summit County decided that a joinder of the offenses of aggravated burglary, carrying a concealed weapon, and having a weapon while under disability was proper, a situation similar to the case at bar. The reasoning of the Dunkins case applies in the present case as well. First, the evidence of the defendant's prior convictions relevant to his disability was simple and direct; in the guilt phase of trial herein, this evidence was concise and indeed was stipulated, (T.pp. 207-209), without any elaboration as to the details. Second, the policy consideration of promoting judicial economy is more compelling where, as here, all the charges are based on the same set of facts and joinder will avoid duplication. Dunkins, id. at 73.

Additionally, it has been settled that repeat offender statutes,

which make proof of a prior conviction an element of the current offenses, do not operate to deny an accused a fair trial and have been held constitutional. State v. Green (1981), 2 Ohio App. 3d 38, 440 NE 2d 615; see Spencer v. Texas (1967), 385 U.S. 554 at pages 565-566 (holding that the Due Process Clause did not prevent a state from enacting such a scheme for dealing with habitual offenders or from admitting evidence of prior convictions during the trial). The trial court is thus required to receive evidence of the prior conviction and to weigh the same in determining guilt and enhancing punishment. State v. Gordon (1971), 28 Ohio St. 2d 45, 276 NE 2d 243.

In capital cases, while Criminal Rule 14 and R.C. Section 2945.20 make provision for automatic severance of jointly indicted defendants, there is no such rule requiring severance of capital and non-capital counts against the same defendant. Further, the bifurcation of trial procedure is not a constitutional requirement, see McGautha v. California (1971), 402 U.S. 183.

In the case at bar, R.C. Section 2929.022 was invoked by defendant when his case was scheduled for a jury trial, with the filing on April 27, 1984, of his election to have his prior-conviction specification "tried by the Trial Judge as opposed to the Trial Jury [sic]". (T.d. 58). On May 4, 1984, the Court accepted this election on the record. (T.d. 89) However, the defendant subsequently altered the trial procedure on May 8, 1984, by waiving a jury trial and electing to be tried by a three-judge panel. (T.d. 90) He did not thereafter make any election regarding the determination of the specification by the three-judge panel. In the

absence of such an election, Revised Code Section 2929.022(A)(1) specifically provides for a single-stage trial as in any other case of aggravated murder with specifications.

Finally, since the case at bar was tried before a three-judge court rather than a jury trial, it is presumed that the judges based their verdict on only the relevant, material and competent evidence. State v. White (1968), 15 Ohio St. 2d 146, 151, 239 NE 2d 65; see also State v. Eubank (1979), 60 Ohio St. 2d 183, 398 NE 2d 567, and State v. Austin (1976), 52 Ohio App. 2d 59, 368 NE 2d 59. Thus, the defendant-appellant was not prejudiced before the three-judge court under the facts of this case.

IV. THE JUDGMENT OF CONVICTION IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Issue Presented for Review and Argument:

> *Where there is credible evidence which supports all the necessary elements of aggravated murder contrary to O.R.C. 2903.01(A), a judgment of conviction will not be reversed.*

"[I]n reviewing the legal sufficiency of the evidence to support a jury verdict, it is the minds of the jurors rather than a reviewing court which must be convinced." State v. Thomas (1982), 70 Ohio St. 2d 79 at 80, 434 NE 2d 1356 at 1357. The Supreme Court has also held in State v. Eley (1978), 56 Ohio St. 2d 169, 383 NE 2d 132, syllabus by the Court:

> A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense had been proven beyond a reasonable doubt.

The rule is no different when the trier of fact is a three judge panel rather than a jury. State v. Smith (1976), 49 Ohio App. 2d 388, 393, 361 NE 2d 267, and State v. Wallen (1969), 21 Ohio App. 2d 27, 34, 254 NE 2d 716. A panel of judges is not required to accept appellant's version of the murder, see State v. Bell (1976), 48 Ohio St. 2d 270, 279, 358 NE2d 556, 563, judgment vacated as to death penalty (1978), 438 U.S. 637. As the trier of fact, it was within the province of the panel to determine which was the credible evidence. State v. Bell, id.

In the case at hand, there was ample credible evidence presented by the state from which reasonable minds could find that the appellant intentionally shot and killed Suzette Butler with prior calculation and design.

Only a matter of hours before the appellant shot the victim four times in the head at point blank range, he engaged in a complicated and reasoned plan to covertly obtain a handgun and bullets which were used to kill Suzette Butler. Davis went to a bar, and paid an individual whom he did not know to purchase an inexpensive handgun in that individual's name. Davis then used that same individual to covertly purchase bullets for the gun at locations other than where he purchased the gun. After the individual bought the wrong ammunition, Davis continued to use this individual to successfully find ammunition which fit the gun. After having found the correct bullets, the Appellant then loaded that ammunition into the gun and concealed the weapon. (T.p. 58-86)

After successfully and covertly obtaining this handgun, the appellant then went to the American Legion arriving shortly after the victim did. He engaged the victim in quiet conversation, and successfully talked her into leaving the crowded bar. (T.p. 103-110) He then shot her four times in the head at point blank range. To ensure the victim was dead, Davis bent over Suzette's Butler's body, placed the gun to her head and fired the last shot. He then calmly got into his car, which happened to be across the street, and made good his escape.

A very significant similar case is State v. Pierce (1980), 64 Ohio St. 2d 281, 414 NE 2d 1038, which also involved a defendant who repeatedly fired a weapon at his victim, killing him. The Court in Pierce approved the following statement of the law:

> No definite period of time must elapse and no particular amount of consideration must be given

> to the prior calculation and design to kill. Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient . . . However neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves. . . ." (Id. at 287.)

Upon consideration of Davis's actions on December 12, 1983, to covertly purchase the weapon used, the evidence established far more than a "spur of the moment" killing. Rather, the actions of appellant, as adduced, show that appellant used extreme aggression against a helpless victim in a scheme design to implement a calculated decision to kill. State v. Robbins (1979), 58 Ohio St. 2d 74, 78-79, 388 NE 2d 755, upholds a finding of "prior calculation and design" where such violence was used against a drunken victim. Here, as in Robbins, the facts do not speak of a "heated brawl" or "spur of the moment" killing, but of appellant's holding the victim's life in cheap regard. Robbins, id. at 79. See also State v. Cotton (1978), 56 Ohio St. 2d 8, 381 NE 2d 190, where, as here, the defendant's repeated shooting of the victim to inflict a fatal wound was a sufficient circumstance to constitute prior calculation and design.

V. THE TRIAL COURT WAS NOT REQUIRED TO STRIKE THE SPECIFICATION OF A PRIOR CONVICTION FOR PURPOSEFUL MURDER FROM THE INDICTMENT.

Issues Presented for Review and Argument:

1. An appellate court need not consider an assignment of error which a party complaining of the trial court's judgment did not call to the trial court's attention by way of a defense or objection.

For the first time in these proceedings, defendant-appellant now raises in his fifth assignment of error a complaint that the Specification of Davis's 1971 second-degree murder conviction should have been stricken from the Indictment. However, this court need not address this proposition of law, since the appellant failed to object in the trial court regarding this issue.

The Ohio Supreme Court has consistently held that an appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. State v. Williams (1977), 51 Ohio St. 2d 112, 364 NE 2d 1364, paragraph one of syllabus. Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial court to be faultless, see State v. Driscoll (1922), 106 Ohio St. 33 at 39, 138 NE 376 at 378. The appellant's attempt to color the issue as a constitutional question doe not change the rule's application; State v. Williams, id. at 117.

If the Specification were improper, this defense or objection to the Indictment should have been raised prior to trial, Criminal Rule 12(B)(2),

and the failure to do so constitutes a waiver under Criminal Rule 12(G).

2. Ohio Revised Code Section 2929.04(A)(5), which provides that a prior conviction for a purposeful killing may be a specified aggravating circumstance calling for the imposition of the death penalty, is not limited in time as to the age of the prior conviction.

The Ohio General Assembly enacted its death penalty scheme in 1974, reenacted in 1981, to set forth specific instances in which the imposition of the death penalty is deemed to be appropriate for aggravated murder. One of these classes is the situation at bar, which the legislature itself has referred to as "repeat murder," see Committee Comments following Section 2929.04. This aggravating circumstance recognizes the special danger demonstrated by an individual who purposely and repeatedly disregards the safety, personal integrity and human worth of others:

> There is a widely held view that those who present the strongest case for severe measures of incapacitation are not murderers as a group (their offenses often are situational) but rather those who have repeatedly engaged in violent combative behavior. A well-demonstrated propensity for life-endangering behavior is thought to provide a more solid basis for infliction of the most severe measures of incapacitation than does the fortuity of a single homicidal incident.

Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1080 (1964), (emphasis added).

Since the provisions of Section 2929.04(A)(5) strictly require a prior conviction for "an offense an essential element of which was the purposeful killing . . . of another, " (i.e. aggravated murder or murder, or their equivalents), it necessarily follows that the offender was

sentenced to a lengthly incarceration for the prior offense. Under current Ohio law, aggravated murder calls for a minimum punishment of life imprisonment, and murder calls for a sentence of 15 years to life, see Revised Code Section 2929.02. Parole eligibility occurs at the earliest for aggravated murder only after 15 full years, see Revised Code Section 2967.13(B) through (E), and for murder, parole is available only after 9 years and 6 months are served, see Ohio Admin. Code 5120:1-1-03(A)(1).

Given these terms of actual incarceration to be served on a prior conviction, it is clear that any parolee who commits a repeat murder will necessarily have a prior conviction which occurred about ten years or more prior to the second killing. Therefore, to adopt appellant's "remoteness" argument would effectively nullify the General Assembly's intent to identify and punish repeat murders committed by paroled offenders. However, the courts owe deference to the decisions of state legislatures, particularly where the specification of punishments is concerned, for these are peculiarly questions of legislative policy, see Gregg v. Georgia (1976), 428 U.S. 153, 174-176; see also Rummel v. Estelle (1980), 445 U.S. 263, 284.

The only case cited by appellant, State v. George (12th Dist. April 30, 1984), Butler Co. No. CA83-04-034, unreported, is inapplicable to the present case. George concerned the admissibility of "other-acts" evidence under common law principles, codified in Revised Code 2945.59 and Evidence Rule 404(B), introduced by the state for the purpose of

proving identity. The George case simply held that the "other acts" evidence was not relevant to the issue of identity, because the time span of 14 years between the prior act and the act constituting the current offense did not lead to the conclusion that the perpetrator is the same in each one. However, in the case at bar, unlike George, the prior conviction was not utilized as proof of identity, but rather its use was clearly limited by the prosecutor and trial court to the specification as a penalty-enhancement factor.

It is quite apparent that Revised Code 2929.04(A)(5) contains no time limitation as to the prior conviction. This is significant, since the General Assembly has elsewhere provided time restrictions as to the prosecution of offenses. (See, e.g., statute of limitations for certain offenses, Revised Code Section 2901.13, and speedy trial provisions, Revised Code Sections 2945.71-.73.) If a similar restriction were intended here, it is logical to assume that the statute would so provide. It is also notable that Revised Code Section 2901.13 provides that there is no statute of limitations as to aggravated murder or murder.

Without any constitutional or statutory reason for declaring the Specification invalid herein, this court must defer to the judgment of the legislature and refrain from judicial re-writing of the statute. This assignment of error should be overruled.

VI. THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY.

Issue Presented for Review and Argument:

Where there is present one or more constitutionally acceptable aggravating circumstances, a court may consider otherwise admissable evidence incorrectly designated as an aggravating circumstance as long as a reviewing court finds that the death penalty is adequately supported by the evidence of the case.

Revised Code Section 2929.03(D)(3) states:

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section . . . if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender . . . (Emphasis added.)

In the case at bar, the three judge panel,in its written opinion, pursuant to R.C. 2929.03(F),listed both the aggravating factors received through testimony, and evidence in this case along with the statutory aggravating circumstance, the defendant was found guilty of, and concluded that the death penalty was the appropriate penalty. R.C. 2929.03(D)(3) specifically mandates that the court consider evidence raised at trial, testimony and other evidence in deciding whether the statutory aggravating circumstances outweigh the mitigating factors. It was the consideration of the evidence and testimony at trial which formed this basis for the non-statutory aggravating factors listed in the court's opinion which the appellant now attacks.

The appellant erroneously argues that the mislabling of aggravating

factors of a case as aggravating circumstances dictates reversible error. However, both the United States Supreme Court in Zant v. Stephens (1983), ___U.S.___, 77 L. Ed 2d 235 and the Ohio Supreme Court in State v. Jenkins (1984), 15 Ohio St. 3d , have held that if evidence is admissable and is incorrectly considered as an aggravating circumstance, the imposition of the death sentence will be upheld as long as the independently reviewing court determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

In Zant, the Georgia Supreme Court had struck down one of three aggravating circumstances condidered by the jury in imposing the death penalty. The Georgia Court still upheld the death penalty. It concluded that since the evidence concerning the defective aggravating circumstance was otherwise admissable, and since the verdict was adequately supported by the evidence, resentencing was not required. Upon review, the United States Supreme Court upheld the Georgia Supreme Court. The court specifically looked to the admissability of the evidence absent its designation as an aggravating circumstance and the scope of the mandatory review by the Georgia appellate courts in determining the propriety of the sentence. Since the evidence was otherwise admissable and the Georgia Supreme Court had reviewed the sentence to guard against arbitrariness and to assure proportionality, the court upheld the sentence.

In Jenkins, the Ohio Supreme Court recently ruled that two of five aggravating circumstances considered by the jury in that case were unnecessarily cumulative; however, the court ruled that this conclusion

does not, in and of itself, necessitate that an appellant be resentenced or the case be reversed. The court stated that if,during appellate review,previously considered aggravating circumstances are otherwise admissable,but not appropriate aggravating circumstances, resentencing is not automatically required where the court independently determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt;and that the jury's consideration of duplicative aggravating circumstances in the penalty phase did not effect the verdict.

Other cases in accord with the reasoning in Zant and Jenkins are: Barclay v. Florida (1983), ___U.S.___, 77 L. Ed 2d 1134 (trial court's consideration of nonstatutory aggravating factors of defendant's prior criminal record and racial motive of the killing, held not to preclude imposition of death penalty where one statutory aggravating circumstance, kidnapping, was present); Harris v. Pulley (9th Cir. 1982), 692 F. 2d 1189, 1194, cert. denied (1983), 75 L. Ed 2d 804; and Williams v. Maggio (5th Cir. 1982), 679 F. 2d 381, 389, cert. denied (1983), 77 L. Ed. 2d 1399.

In the case at bar, appellant is fully protected not only by the rule of law set forth in Zant and Jenkins, but also by R.C. 2929.05(A). This section requires both the Court of Appeals and Supreme Court to make an independent review of the sentence of death based on the facts and evidence disclosed in the record to ensure that the aggravating circumstances that the offender was found guilty of committing,outweigh

the mitigating factors in the case. The same section further dictates that both courts determine whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.

In appellant's case, the aggravating factors of the appellant's conduct considered by the three judge panel in its opinion and referred by them as "aggravating circumstances" were admissable evidence in the case in chief. O.R.C. 2929.03(D) mandates that the aggravating facts raised at trial through testimony and evidence, and referred to in the court's opinion, be considered by the three judge panel in determining whether the statutory aggravating circumstances outweigh the mitigating factors. A reading of the court's opinion and the evidence taken as a whole clearly affirm that the court followed the intent of the law.

However, even if this court finds the trial court considered improper aggravating circumstances, under Zant and Jenkins a resentencing is not appropriate. Those items labeled by the trial court as inappropriate aggravating circumstances are still admissable evidence, and under O.R.C. 2929.03(D) must be considered by the three judge panel in determining sentence. In addition, this appellate court must make an independent determination based on these same facts and evidence whether it believes the death penalty is appropriate. The scope of mandatory review provided by the law and Supreme Court decisions is extensive to guard against arbitrary, capricious and disproportionate sentencing. Any possibility of error that the three judge panel made is protected against when both this appellate and the Ohio Supreme Court undertakes

its responsibility to independently weigh all the evidence, and determine whether the remaining aggravating circumstance which appellant was found guilty of committing, outweighs the minor and insignificant mitigating factors present in this case.

VII. THE DEATH SENTENCE AS TO DEFENDANT-APPELLANT IS NOT EXCESSIVE OR DISPROPORTIONATE TO THE CRIME COMMITTED, WHICH IS NOT SIMILAR TO ANY RECENT CASE.

Issue Presented for Review and Argument:

> *The Eighth Amendment does not require comparative proportionality review of a death sentence with other similar cases; and to the extent that Ohio Revised Code Section 2929.05(A) requires such review, there is no "similar case" involving repeat murder with prior calculation and design and with no substantial mitigating circumstances.*

In the constitutional sense, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular category of crime. In that sense, looking to the gravity of the offense and the severity of the punishment, the death penalty has been declared inherently disproportionate when imposed for rape, Coker v. Georgia (1977), 433 U.S. 584, and when imposed upon an accomplice to a felony murder who did not himself kill, attempt to kill, or intend to kill the victim, Enmund v. Florida (1982), 458 U.S. 782. On the other hand, "we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes." Gregg v. Georgia (1976), 428 U.S. 153, at 186. Thus, there is no proportionality issue in the constitutional sense. See also State v. Jenkins(1984), 15 Ohio St. 3d ____.

In Pulley v. Harris (1984), ___U.S.___, 79 L. Ed. 2d 29, 104 S. Ct.

871, the Court held that the Eighth Amendment does not require that a state appellate court must compare the death sentence in the case before it with the penalties imposed in other similar cases. The Court noted that although the much-copied Georgia statute contained a provision for such appellate comparison, see Gregg v. Georgia at 204-206, the upholding of the Georgia scheme did not mean that such review is indispensable to a finding of constitutionality; it was further noted that the Texas scheme was also upheld, although it did not include this comparative proportionality review, in Jurek v. Texas (1976), 428 U.S. 262.

The "much-copied Georgia scheme" was indeed copied by the Ohio enactment in 1981, and thus the provision for comparative proportionality review is a statutory component of Ohio Revised Code Section 2929.05(A). The legislative intent is designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants, for discriminatory reasons, or wantonly or freakishly in comparison with the "practice among juries faced with similar factual situations and like aggravating circumstances," Gregg v. Georgia, id. at 205. (Emphasis added.) See also concurring opinion of White, J. at 224.

The problem with this question on review is that there is no "similar case," involving repeat murder by a paroled offender who presented little in the way of any meaningful mitigation and showed absolutely no remorse, contrition or even accountability for the murder of an innocent victim. A simple recitation by appellant of some of the aggravated murder cases in Butler County, without any comparison of the individuals charged and mitigating factors presented, does not facilitate

this court's present inquiry.

> "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." State v. Bell (1976), 48 Ohio St. 2d 270 at 281, 358 NE 2d 556 at 564, citing Williams v. New York (1949), 337 U.S. 241 at 247.

With the idea that the statutory review requires comparison with other cases "similar" as to the facts of the offense, "similar" as to like aggravating circumstances, and "similar" as to the mitigating factors presented, a search of capital cases tried in this state reveals virtually no similar case; but in cases which are arguably comparative to the case at bar, the death penalty has been imposed.

A study of capital cases in Ohio will reveal that Von Clark Davis thus far is the only offender to be tried and convicted of aggravated murder with the repeat murder specification under R.C. 2929.04(A)(5). The only other aggravating circumstance under Ohio law which bears any similarity to the repeat murder situation is the "mass murder" specification, which is also found in the same subsection (5) of the statute, R.C. 2929.04(A); the similarity lies in the fact that the offender is charged with having caused multiple, purposeful deaths. In the "mass-murder" category, the imposition of the death penalty for such crimes has been uniform in Ohio since the passage of the new law: State v. Frank Spisak, Jr., Cuyahoga Co. (8-10-83); State v. Rosalie Grant, Mahoning Co. (10-21-83); State v. Reginald Brooks, Sr., Cuyahoga Co. (12-1-83); State v. Dale N. Johnston, Hocking Co. (3-23-84); and State v. Terry L. Coffman, Clinton Co. (10-26-84). It is also quite well-

demonstrated in the three-year history of the current statute that the death penalty for aggravated murder, throughout the state of Ohio, has not been imposed in an arbitrary or capricious manner or for discriminatory reasons. State v. Jenkins, supra at page _____.

A review of Butler County's recent capital cases reveals, contrary to appellant's brief, that Von Clark Davis is the only recent capital offender convicted in Butler County under R.C. 2903.01(A), aggravated murder with prior calculation and design. Second, Davis is likewise the only repeat murderer in Butler County or in the state of Ohio, to date. Third, Davis presented virtually nothing of a qualitative nature to mitigate or lessen the degree of his responsibility or accountability. Davis was a 37-year-old man, a convicted murderer, paroled from a life sentence, for whom the following observations are appropriate:

> . . . Proposals for the individualization of punishment stem ordinarily from a position that has been well characterized as the rehabilitative ideal. . . . Indulging for the moment the presently dubious assumption that we are equipped to subject the general run of criminals to reformative measures, there remains a dark underside to the rehabilitative ideal. What are we to do with those whom we cannot reform and, in particular, those who by our failure are thought to remain menaces to life? Current penal theories admit, indeed insist upon, the need for permanent incapacitation in such cases. Once this need is recognized, the death penalty as a means of incapacitation for the violent psychopath can hardly be objected to on grounds that will survive rational scrutiny, if the use of the death penalty in any situation is to be permitted.

Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1081 (1964). The psychological evidence presented in the sentencing phase of the present case indicated that Davis was "free of any mental disease

or defect which would have impaired his capacity to appreciate the criminality of his conduct or to have conformed [sic] his conduct to the requirements of the law." (T.pp. 402-403, 404) In essence, the facts reflect merely that Davis has a psychological "difficulty [in] relating to women in solving problems that he has with them in a nonviolent way." (T.pp. 406-407) This "psychological problem" in no way mitigates Davis's current offense, but simply explains the recidivist's capacity to take life twice.

Contrasted with Davis's lack of any mitigating factors, the other cases in Butler County each contained mitigation evidence deemed sufficient to impose life imprisonment rather than death. Thus, in State v. Gerald Ray Johnson, Case No. CR83-07-0302, (December 2, 1983), a youthful 22-year old offender, whose prior criminal history consisted only of non-violent theft offenses, pled guilty to aggravated murder without specifications in consideration of the fact that the prosecution's case was entirely circumstantial, based on a single fingerprint. In State v. Bradford A. Gill, Case No. CR84-03-0200, (June 21, 1984), a 27-year old who had no prior criminal history pled guilty to aggravated murder with a specification of Kidnapping; the three-judge court deemed the aggravating circumstance a "technical" one based on their assessment that the sexual activity involved was "minimal", and found that the aggravating conduct was outweighed by the mitigating factors. In State v. Ernest L. Gaither, Case No. CR84-02-0125 (August 27, 1984), a 27-year old, whose only prior conviction for carrying a concealed weapon was unknown by the sentencing jury pleaded his own case for mercy in an unsworn

statement, apparently convincing the jury that the psychiatric evidence of his mental instability at the time of the offense was a mitigating factor, although not sufficient to constitute legal insanity. Finally, in State v. James Donald Pierce, Case No. CR84-02-0090, (September 28, 1984), a jury was persuaded that one or more mitigating factors existed regarding the shooting of Donald Reeder, himself a convicted armed robber; the defense presented psychiatric testimony of Pierce's immaturity and the defense also argued that by Reeder's verbal taunting of Pierce, the victim induced or facilitated his own demise.

It is also inappropriate and unproductive for other reasons to compare Davis's case to the other Butler County cases, all of which were charged under subsection (B) of Revised Code 2903.01, unlike appellant's case. Although each involved an underlying felony as an element of aggravated murder as well as Specifications for the felony under Revised Code 2929.04(A)(7), to compare such specifications with the repeat murder specification is to compare bad apples with a bad orange; all are reprehensible, and it is not a judicial duty to make a judgment of personal distaste as to which "circumstance" is more or less "aggravating." All categories, of course, implicate different societal interests, making any such comparison inherently speculative. See Rummel v. Estelle (1980), 445 U.S. 263, 282 at n. 27.

In closing, the following words from the decision in Gregg v. Georgia indicate that capital punishment may be the appropriate sanction from the aspect of deterrence in this case:

> . . . There are carefully contemplated

> murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.
>
> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures. . . . (Id. at 186.)

The death penalty is indeed the appropriate sanction in the case at bar for the cold, calculated, repeat murder by Von Clark Davis, and the sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of conviction herein should be affirmed.

Respectfully submitted,

JOHN F. HOLCOMB
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

By

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Brief of Plaintiff-Appellee was mailed by U.S. ordinary mail to Timothy R. Evans, Attorney for Defendant-Appellant, 315 S. Monument Avenue, Hamilton, Ohio 45011, this 32D day of January, 1985.

Michael J. Sage

MICHAEL J. SAGE
ASSISTANT PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

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Appellant's Motion for Extension of Time
to File Reply Brief

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

STATE OF OHIO, *

Appellee, * Case No. Butler 84-06-071

VS. * OPINION AND ENTRY.

VON CLARK DAVIS, *

Appellant. *

* * * * * * * * *

Upon motion of counsel for the appellant requesting one (1) additional week in which to file a reply brief in the above-captioned matter, and for good cause shown, it is hereby ORDERED that the appellant is granted one (1) additional week to file a brief to be due no later than 9:30 A.M., January 22, 1985. No further extensions will be granted.

Richard N. Koehler, Judge

MISSING DOCUMENT

Appellant's Reply Brief

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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IMAGED

COPY

STATE OF OHIO, * CASE NO. CA84-06-071

Plaintiff-Appellee *

vs. * SEPARATE OPINION PURSUANT TO R.C. 2929.05(A)

VON CLARK DAVIS, *

Defendant-Appellant *

Pursuant to R.C. 2929.05(A), this court certifies that it has reviewed the judgment, the sentence of death, the transcript and all of the facts and other evidence in the record in this case and makes the following independent findings:

1) The evidence supports the finding by the three judge panel that appellant Von C. Davis was guilty of aggravated murder and the aggravating circumstance charged in the indictment.

2) The aggravating circumstance for which appellant was found guilty outweighs the mitigating factors in this case.

3) The death sentence is not excessive or disproportionate to the sentence imposed in similar cases.

4) The sentence of death is appropriate in this case.

In making this certification and these findings, this court incorporates its full opinion affirming the conviction and sentence in this case.

Judgment affirmed.

William R. Hendrickson
Presiding Judge

Richard N. Koehler, Judge

Fred E. Jones, Judge

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IN THE COURT OF APPEALS

JUDGMENT

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

COPY

STATE OF OHIO, * CASE NO. CA84-06-071

Plaintiff-Appellee *

vs. * JUDGMENT ENTRY

*

VON CLARK DAVIS, *

Defendant-Appellant

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Butler County, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

William R. Hendrickson
Presiding Judge

Richard N. Koehler, Judge

Fred E. Jones, Judge

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J 20 P 783

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

#CR83-12-0614

STATE OF OHIO, * CASE NO. CA84-06-071

Plaintiff-Appellee * MANDATE

vs. JUDGMENT ENTRY

FILED in Court of Appeals
BUTLER COUNTY, OHIO
MAY 27 1986
EDWARD S. ROBB, JR.
CLERK

IMAGED

VON CLARK DAVIS,

Defendant-Appellant

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William R. Hendrickson
Presiding Judge

FILED in Common Pleas Court
BUTLER COUNTY, OHIO
MAY 27 1986
EDWARD S. ROBB, JR.
CLERK

Richard N. Koehler, Judge

Fred E. Jones, Judge

I CERTIFY THE WITHIN TO BE A
TRUE COPY OF THE ORIGINAL FILED
May 27 19 86
EDWARD S. ROBB, JR.
Butler County Clerk of Courts
Jerome Cook Deputy

37

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO, * CASE NO. CA84-06-071

Plaintiff-Appellee *

*

vs. * O P I N I O N

5-27-86

VON CLARK DAVIS, *

Defendant-Appellant *

John F. Holcomb, Butler County Prosecutor, Butler County Courthouse, Hamilton, Ohio 45012, for Plaintiff-Appellee

Holbrock & Johnson Law Firm, Timothy R. Evans, 315 So. Monument Avenue, Hamilton, Ohio 45011, for Defendant-Appellant

KOEHLER, J.

Today we address questions raised by appellant Von Clark Davis' aggravated murder conviction and subsequent death sentence. On December 12, 1983, at approximately 7:40 p.m., police officers of the Hamilton Police Department reported to the scene of a shooting at 727 Central Avenue, the location of American Legion Post #520. Lying on the pavement approximately six feet outside the front door was the body of a young woman later identified as Suzette Butler. An autopsy performed the next day at the direction of the Butler County Coroner revealed that Butler

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J 20 P 785

had died of multiple (four) gunshot wounds to the left side of her head.

During the noon hours of December 12, 1983, appellant had sought out one Mark Lovette at Gabe's Tavern and had requested that Lovette "do him a favor." Along with one Wade Coleman, a cousin of appellant, they drove in appellant's automobile to Gil's Loans, a pawn shop, where Lovette purchased for appellant a $49.50 Raven P25 semi-automatic handgun. After stopping to purchase shells at a K-Mart store, Lovette was taken back to Gabe's Tavern.

Shortly thereafter, appellant and Coleman again appeared at Gabe's. The record indicates that the shells previously purchased at K-Mart "didn't fit the gun very well." Appellant drove to Butler County Gun in Fairfield where Lovette purchased one box of PMC .25 automatic shells. These shells were turned over to appellant. In the presence of both Lovette and Coleman, appellant then loaded four or five shells into the clip, placed the clip inside the gun, and slid the gun under the driver's seat. At trial, Coleman testified that appellant dropped him off at his residence at approximately 3:00 or 3:30 p.m.[1]

At approximately 5:30 or 6:00 p.m., Butler, the victim of the shooting, met one Mona Aldridge at the above mentioned American Legion. Appellant arrived about five minutes later and walked up to Butler at the bar. After approximately one hour, appellant and Butler went to a table where they were joined by

Aldridge. Five or ten minutes elapsed at which time appellant and Butler arose and walked out the front door. Before leaving, Butler told Aldridge that she would be "right back" and requested that Aldridge watch her personal articles, i.e., a jacket and her cigarettes and drink.

After several minutes Aldridge became concerned and went to the front door to check on Butler. Upon cracking the door open, Aldridge observed that appellant and Butler were standing approximately three or four feet apart and that appellant had a gun pointed at Butler's head. Aldridge panicked and went back inside the bar. Shortly thereafter, others came in behind her saying that someone had been shot.

The record further establishes that Cozette Massey and Reginald A. Denmark witnessed this shooting. At approximately 7:15 p.m., they had departed Massey's apartment intending to take a walk around downtown Hamilton "to look at the Christmas lights." As they were walking down Central Avenue they saw two people talking in front of the American Legion. It did not appear as if these individuals were arguing. At this point, two shots rang out and the woman put her hands up to her face and exclaimed "oh, no." As she fell, another shot was fired. Finally, "*** after she was down, he bent down and shot her in the head, it was about a couple inches from her head ***." At trial, both Massey and Denmark identified appellant as that person who had shot Butler.

Appellant was subsequently arrested and an indictment was filed against him on January 6, 1984. In count one thereof, appellant was charged with the aggravated murder of Butler in violation of R.C. 2903.01(A)[2], with specification of having a firearm. Count one also contained a specification of the aggravating circumstance that prior to this offense appellant had been convicted of an offense an essential element of which was the purposeful killing of, or attempt to kill, another [R.C. 2929.04(A)(5)].[3] In count two, it was alleged that appellant did knowingly acquire, have, carry or use a firearm having previously been convicted of felonies of violence, i.e., shooting with intent to wound on April 10, 1970 and murder in the second degree on April 20, 1971, in violation of R.C. 2923.13(A)(2).[4]

Appellant waived his right to a jury and the guilt phase of his trial commenced on May 9, 1984 before a three judge panel of the Court of Common Pleas of Butler County. The three judge panel found appellant guilty of both counts of the indictment and of both specifications to count one. On May 29, 1984, the penalty phase of the trial was held to determine whether the death penalty would be imposed. The panel found that the aggravating circumstance of the murder outweighed the mitigating factors and, inter alia, sentenced appellant to death.

On this appeal appellant raises seven assignments of error as follows:

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FIRST ASSIGNMENT OF ERROR:

"The court erred in failing to dismiss the death penalty specifications against the defendant on the grounds that the death penalty is unconstitutional."

SECOND ASSIGNMENT OF ERROR:

"The court erred in failing to allow the defendant the right to inspect the grand jury transcript."

THIRD ASSIGNMENT OF ERROR:

"The court erred in denying defendant's motion to bifurcate the trial and to sever the charges."

FOURTH ASSIGNMENT OF ERROR:

"The judgment was against the manifest weight of the evidence and contrary to law."

FIFTH ASSIGNMENT OF ERROR:

"The court erred in not dismissing the specification of the indictment that the appellant had committed a prior homicide, on the basis that such specification was too remote in time to be used against appellant."

SIXTH ASSIGNMENT OF ERROR:

"The court erred in imposing the death penalty as the court found as aggravating [circumstances] factors not listed in the Ohio Revised Code and factors which were improper for consideration under the Ohio Revised Code."

SEVENTH ASSIGNMENT OF ERROR:

"Under the proportionality review required to be done by this court, the penalty imposed upon Von Clark Davis is out of proportion to the other sentences given for similar crimes in this county."

The constitutional claim raised by appellant's first

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assignment of error has been subdivided into ten issues. Before considering those issues, however, we note that the statutory framework for imposition of capital punishment has been upheld by the Ohio Supreme Court in the context of the arguments raised in State v. Jenkins (1984), 15 Ohio St. 3d 164, certiorari denied (1985), 473 U.S.__, 105 S.Ct. 3514; State v. Maurer (1984), 15 Ohio St. 3d 239; State v. Mapes (1985), 19 Ohio St. 3d 108; State v. Martin (1985), 19 Ohio St. 3d 122; and, State v. Buell (1986), 22 Ohio St. 3d 124. Paragraph one of the syllabus to Maurer, supra, states:

> "Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution. (State v. Jenkins, 15 Ohio St. 3d 164, paragraph one of the syllabus, followed.)"

The ten issues raised by appellant are as follows:

> "1. The death penalty violates Article 1, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution." (Under this issue, it is appellant's position that the death penalty violates due process in that the societal interests at stake, i.e., deterrence, incapacitation, and retribution, can be adequately protected with a less restrictive approach than the imposition of death, i.e., life imprisonment.)
>
> "2. Ohio's death penalty violates the Eighth Amendment of the United States Constitution and Ohio Constitution, Article One, Section 9, prohibiting the infliction of cruel and unusual punishment." (Here,

appellant argues that the death penalty constitutes cruel and unusual punishment in that it is more severe than is necessary to serve legitimate state interests.)

"3. The death penalty is arbitrarily and capriciously applied, constituting a denial of equal protection of the laws." (Appellant raises several arguments under this issue: (a) that the death penalty is arbitrary and capricious since prosecutors inevitably exercise discretion in pursuing capital cases; (b) that the extent of proportionality review is constitutionally infirm in that neither a three judge panel nor a jury is required under R.C. 2929.05(A) to determine whether a particular sentence of death is excessive or disproportionate to sentences imposed in similar cases; (c) that the sentencing procedure is inadequate and unconstitutional in that neither a three judge panel, a judge nor a jury is required to decide the appropriateness of the death penalty.)

"4. The Sections of the Ohio Revised Code that deal with the death penalty, deprive the Defendant of due process of law and constitute cruel and unusual punishment because these provisions permit imposition of the death penalty on a less than adequate showing of guilt and the appropriateness of the death penalty." (Appellant here raises two arguments: (a) that in a capital case, the state's burden should be "proof beyond all doubt"; (b) that the statutory definition of "reasonable doubt" contained in R.C. 2901.05(D) is inadequate and fails to convey the concept of reasonable doubt required by In re Winship (1970), 397 U.S. 358.)

"5. The death penalty provisions in the Ohio Revised Code constitute cruel and unusual punishment and violate due process and equal protection by requiring proof of aggravating circumstances in the guilt stage of the death penalty deliberations."

6. R.C. 2929.022 and 2929.03-.04, which provide for sentencing before the same jury

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or panel of judges that determines the facts at trial, violate the defendant's rights to effective assistance of counsel and a fair trial before an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by the Ohio Constitution.

"7. Section 2945.25(C) of the Ohio Revised Code violates the Defendant's right to an impartial jury." (It is appellant's position that the so-called death qualification process of a jury prior to the guilt phase of a capital prosecution violates an accused's right to an impartial jury in that the death-qualified jury is claimed to be predisposed to convict.)

"8. The Ohio Revised Code implementing the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 and 16 of the Ohio Constitution." (Under this issue, appellant argues: (a) that the imposition of the death penalty under Ohio's statutory structure is constitutionally infirm for failing to provide necessary and adequate guidance to the sentencing authority in relation to "weighing" aggravating circumstances and mitigating factors; (b) that his death sentence should be set aside in that the capital punishment scheme fails to allocate the burden of proof as to the existence of mitigating factors; (c) that the death penalty in Ohio is constitutionally defective since the state is not required to prove the absence of any of the mitigating factors.)

"9. The Ohio Revised Code on the death penalty violates the cruel and unusual punishment provisions of the U.S. and Federal Constitutions [sic] by failing to provide the sentencing authority with an option to choose life imprisonment when there are aggravating circumstances and no mitigating circumstances."

"10. The death penalty violates the cruel and unusual provisions of the State and

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> Federal Constitutions and the due process clauses of the State and Federal Constitutions because the aggravating circumstances are overbroad and vague and fail to reasonably justify the imposition of a more severe sentence."

Each of the foregoing issues was considered and rejected in either Jenkins, supra, or Buell, supra, with the exception of issues 3(b) and 10. (As to issue 1, see Jenkins, pp. 167-168; issue 2: Jenkins, pp. 168-169; issue 3(a): Jenkins, pp. 169-170; issue 3(c): Buell, pp. 136-137; issue 4(a): Jenkins, p. 210; issue 4(b): Jenkins, p. 211; issue 5: Jenkins, pp. 173-174; issue 6: Jenkins, pp. 173-174, footnote 11; issue 7: Jenkins, pp. 179-188, State v. Williams (1985), 23 Ohio St. 3d 16, Lockhart v. McCree (1986), __ U.S. __, 39 Cr. L. 3085; issue 8(a): Jenkins, pp. 172-173; issue 8(b): Jenkins, pp. 171-172; issue 8(c): Jenkins, p. 171; issue 9: Buell, p. 141.) Issues 3(b) and 10 we address below.

In pertinent part, R.C. 2929.05(A) provides:

> "Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender

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> to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. ***"

As noted above, appellant's argument under issue 3(b) is that Ohio's statutory framework for the imposition of capital punishment is constitutionally infirm in that neither juries nor three judge panels are required to conduct proportionality review. Initially, we observe that the United States Supreme Court, in Pulley v. Harris (1984), 465 U.S. 37, held that neither Gregg v. Georgia (1976), 428 U.S. 153; Proffitt v. Florida (1976), 428 U.S. 242; nor Jurek v. Texas (1976), 428 U.S. 262, established proportionality review as a constitutional requirement. At p. 39, the court stated:

> "*** Needless to say, that some schemes providing for proportionality review are constitutional does not mean that such review is indispensible. We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable. *** Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement."

Although proportionality review is not constitutionally required in every case, the question remains whether the absence of proportionality review at the trial court level creates a fatal defect in the capital punishment scheme. We think not.

"The fundamental purpose behind proportionality review is to ensure that sentencing authorities do not retreat to the pre-Furman[5] era when sentences were imposed arbitrarily, capriciously and indiscriminately." Jenkins, supra, at p. 176. Incorporated into Ohio's death penalty statutes are several factors which minimize the risk of arbitrary and capricious sentencing. Among these are bifurcated proceedings, the limited number of chargeable capital crimes, the requirement that at least one aggravating circumstance be found to exist and the consideration of a broad range of mitigating factors. We hold that appellant's issue 3(b) is not well-taken.

In connection with the argument raised by issue 10, appellant principally relies on the decision of the United States Supreme Court in Godfrey v. Georgia (1980), 446 U.S. 420. Therein, the court vacated a death sentence predicated upon the aggravating circumstance that the murder was outrageously or wantonly vile, horrible or inhuman. In finding this aggravating circumstance overbroad, the Supreme Court, at pp. 428-429, stated that "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"

Appellant's contention that the reasoning of Godfrey is applicable to the case sub judice is without merit. Unlike the aggravating circumstance at issue in Godfrey, the aggravating circumstances contained in R.C. 2929.04(A)(1) through (8)[6] are

sufficiently explicit to distinguish those cases in which the death sentence is imposed, from those cases in which the death sentence is not imposed. See Maurer, supra, at pp. 242-243; and, Buell, supra, at pp. 141-142. The first assignment of error is overruled.

By his second assignment of error, appellant maintains that "The court erred in failing to allow the defendant the right to inspect the grand jury transcript." In support of this assignment, appellant argues as follows: "Where the Defendant moves to dismiss and to inspect the grand jury transcript for purposes of showing that the indictment against him was not based upon probable cause and that the indictment was founded on illegal and incompetent evidence, the Defendant has a right to inspect the Grand Jury testimony."

Crim. R. 6(E) delineates the degree of secrecy accorded grand jury proceedings:

> "Secrecy of proceedings and disclosure. Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that

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grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. ***"

Construing this rule in State v. Greer (1981), 66 Ohio St. 2d 139, the Ohio Supreme Court held that because of the general policy that grand jury proceedings are to be kept secret, they may be disclosed only where the accused is able to demonstrate a "particularized need," i.e., when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial. Based on the record before us, this court finds that appellant has failed to demonstrate a particularized need to inspect the grand jury testimony which outweighs the need for secrecy.

Appellant's motion to dismiss the indictment was premised on the argument that said indictment was not based upon probable cause and was founded on illegal and incompetent evidence. However, in the case of United States v. Calandra (1974), 414 U.S. 338, 344-345, the United States Supreme Court held that "The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. ***" See, also, Villasino v. Maxwell (1963), 174 Ohio St. 483, 485 ("'If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand

jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.'"); Wickline v. Alvis (1957), 103 Ohio App. 1 ("An indictment and subsequent proceedings based thereon are not rendered invalid on the ground that illegal and incompetent testimony was heard by the grand jury which voted such indictment."); United States v. Adamo, 742 F.2d 927, 939 (6th Cir. 1984), certiorari denied (1985), 105 S.Ct. 971 ("*** A grand jury presented with inadequate or incompetent evidence may nevertheless be an unbiased grand jury capable of returning a valid indictment."). Because the validity of an indictment, valid on its face, may not be attacked on the basis that the grand jury acted upon inadequate or incompetent evidence, appellant has failed to demonstrate a particularized need to inspect the grand jury testimony. Appellant's second assignment of error is overruled.

Next appellant contends that the trial court erred in refusing to sever the two charges contained in the indictment, i.e., aggravated murder and having weapons while under

disability.

Crim. R. 8(A) governs the joinder of offenses and provides as follows:

> "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction ***."

The evidence of record in this case reveals that the crimes charged in the indictment arose from the same act or transaction. Therefore, they should have been prosecuted in a single prosecution unless the trial court, in the interest of justice, ordered that they be tried separately.[7]

R.C. 2941.04 provides, in pertinent part, that:

> "*** The court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. ***"

Similarly, Crim. R. 14, entitled "Relief from Prejudicial Joinder," provides that:

> "If it appears that a defendant or the state is prejudiced by a joinder of offenses *** in an indictment, information, or complaint, *** the court shall order an election or separate trial of counts *** or provide such other relief as justice requires. ***"

The fact that a necessary element of one of the crimes alleged in an indictment is proof of conviction of a prior felony does not, in and of itself, require the trial court to order a

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separate trial. While we may agree that trying the two offenses here involved in a single prosecution placed appellant in a disadvantageous position at trial, under Crim. R. 14 "[a] defendant who asserts that joinder is improper has the burden of making an affirmative showing that his rights will be prejudiced ***" by the joinder. State v. Roberts (1980), 62 Ohio St. 2d 170, 175, certiorari denied, 449 U.S. 879. "[T]he burden (is) upon the defendant to either affirmatively demonstrate before trial that his rights would be prejudiced by the joinder, or to show at the close of the state's case, or at the conclusion of all the evidence, that his rights actually had been prejudiced by the joinder." State v. Williams (1981), 1 Ohio App. 3d 156, 159; see, also, State v. Owens (1975), 51 Ohio App. 2d 132.

As to the pre-trial prong of this "test", appellant argues that "*** the Court's failure to grant the Motion to Sever *** denied Defendant a fair trial and had a chilling effect on his right to a jury trial, since he was faced with either choosing a three judge panel or a jury who would know about the prior homicide. While the jury may be given an instruction that this is only to be used for the weapons under disability charge or for determining the specification, it is not credible to believe that a jury could not take this into consideration when determining guilt." This argument is without merit. At best, it merely raised a risk of prejudice; it did not make the required showing of prejudice. Williams, supra, at 159. It is presumed that a

jury will obey a trial court's instructions. State v. Dunkins (1983), 10 Ohio App. 3d 72, 73.

Nor was there actual prejudice to appellant. The evidence of the prior convictions was simple and distinct; there was no elaboration as to the details of appellant's prior second degree murder conviction. Also, the evidence of guilt was so overwhelming that it may be concluded, beyond a reasonable doubt, that the introduction of the prior convictions did not contribute to the guilty verdict. Under the circumstances in this case, the denial of appellant's motion to sever did not prejudice his right to a fair trial. See Stone v. State (1984), 253 Ga. 433, 321 S.E.2d 723; State v. Hilongo (1982), 64 Haw. 577, 645 P.2d 314; Pope v. State (1983), 168 Ga. App. 846, 310 S.E.2d 575; Dunkins, supra; cf., State v. Vazquez (Supreme Court of Florida, 1982), 419 So.2d 1088.

Additionally, appellant raises a second argument in support of this assignment of error. Under the Ohio capital punishment scheme, proof of aggravating circumstances is to be adduced at the guilt phase of the capital trial. However, R.C. 2929.022(A), entitled "Determination of aggravating circumstance," states:

> "If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code [see footnote 3, supra], the defendant may elect to have the panel of three judges, if he waives trial by jury, or the trial judge, if he is tried by jury, determine the existence of

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that aggravating circumstance at the sentencing hearing ***."

The thrust of appellant's "second argument" is as follows: Crim. R. 8 permitted the joinder of the counts contained in the indictment. Under R.C. 2929.022(A), however, appellant could elect to have proof of prior convictions, an essential element of which was the purposeful killing of or attempt to kill another, determined at a sentencing hearing. When the trial court refused to sever the two counts, proof of appellant's prior second degree murder conviction, a necessary element of the second count, was rendered admissible at trial. This abridged appellant's statutory right under R.C. 2929.022(A) to elect to have evidence of prior purposeful killings considered only at a sentencing hearing.

Appellant's argument in this regard is without merit. As stated above, Ohio's statutory framework for imposition of capital punishment directs that aggravating circumstances be determined at the guilt phase. Accordingly, but for R.C. 2929.022(A), the state would be able to bring in evidence not otherwise admissible under the rules of evidence; i.e., were R.C. 2929.022(A) not included in the statutory framework, evidence pertaining to prior purposeful killings would not be considered prejudicial but, rather, would be admissible at trial to prove the aggravating circumstance of R.C. 2929.04(A)(5). The simple purpose of R.C. 2929.022(A) is to provide the capital defendant with a mechanism whereby the introduction of such evidence may be

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precluded. Stated in other words, when the R.C. 2929.022(A) election is made, evidence concerning prior purposeful killings not otherwise admissible may not be introduced to prove an aggravating circumstance. Contrary to appellant's second argument, it is not the purpose of R.C. 2929.022(A) to provide the defendant with a blanket statutory right to preclude, at the guilt phase, the introduction of all evidence pertaining to prior purposeful killings which is otherwise admissible. The third assignment of error is hereby overruled.

In his fourth assignment of error, appellant contends that "The judgment was against the manifest weight of the evidence and contrary to law." Specifically, appellant asserts that the evidence does not support a finding of that "prior calculation and design" required for an aggravated murder conviction.

The Court of Appeals for Cuyahoga County, Markus, J., discussed the requirement of prior calculation and design in State v. Davis (1982), 8 Ohio App. 3d 205, 206-207:

> "Prior calculation and design sets up a more demanding standard than the old first degree murder standard of 'deliberate and premeditated malice.' Prior calculation and design requires the accused to have killed purposefully after devising a plan or scheme to kill. There must be some kind of studied analysis with its object being the means by which to kill. The kind of momentary deliberation or instantaneous premeditation that was the accepted standard under the old statute, as exemplified by State v. Schaffer (1960), 113 Ohio App. 125 ***, is no longer sufficient or acceptable."

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See, also, State v. Robbins (1979), 58 Ohio St. 2d 74; State v. Cotton (1978), 56 Ohio St. 2d 8; State v. Stidham (May 11, 1983), Brown App. No. 404, unreported; State v. Jenkins (1976), 48 Ohio App. 2d 99, 101-102.

Although appellant's precise state of mind during the evening hours of December 12, 1983 was not established, other evidence addressed at trial supports the conclusion that appellant murdered Suzette Butler according to a plan and with prior calculation and design. First, the state's evidence, which the three judge panel evidently believed, indicates that the shooting was not the result of an "instantaneous eruption of events." To the contrary, neither Massey nor Denmark (who witnessed the shooting) nor Aldridge (who sat with appellant and the decedent inside the American Legion bar) testified at trial as to any sort of verbal or physical confrontation between appellant and the decedent. Massey and Denmark testified that they saw two people "talking" in front of the American Legion. Further, the state's evidence was that during the afternoon of the shooting appellant purchased the murder weapon and ammunition through a third person. Then, in the presence of both Lovette and Coleman, he loaded the gun and slipped it under the driver's seat of his automobile. Only a few hours later appellant used this gun to fire four shots, at close range, into the left side of the decedent's head. The final shot came in execution style: "*** (A)fter she was down, he bent down and shot her in the head, it

was about a couple inches from her head ***."

These facts, as could be interpreted by the three judge panel, do not so much speak of momentary deliberation or instantaneous premeditation as of appellant's holding Suzette Butler's life in cheap regard. The record reflects substantial evidence of that studied analysis required for a finding of "prior calculation and design." See State v. Eley (1978), 56 Ohio St. 2d 169, 172. Appellant's fourth assignment of error must be rejected.

The fifth assignment of error is also without merit. Thereunder, appellant argues that "The court erred in not dismissing the specification of the indictment that the appellant had committed a prior homicide, on the basis that such specification was too remote in time to be used against appellant."

In support of this assignment, appellant relies solely on this court's decision in State v. George (Apr. 30, 1984), Butler App. No. CA83-04-034, unreported. George raised the question of whether certain testimony, relating to an act which had occurred fourteen years prior to trial, was admissible into evidence. Such testimony was offered by the state for the purpose of determining the identity of the individual responsible for the crime at issue. Therein, and under the unique facts presented by that case, we held: "*** the prior act of (the defendant) does not have such a temporal relationship with the act constituting the crime charged that evidence of the prior act discloses that the

identity of the perpetrator is the same in each one." IMAGED

George is readily distinguishable from the case sub judice. Unlike the testimony at issue in George, evidence of appellant's 1971 second degree murder conviction was here offered, in connection with R.C. 2929.04(A)(5), simply to demonstrate that appellant had, in fact, previously been convicted of an offense an essential element of which was the purposeful killing of another. Additionally, we note that Mapes, supra, involved the aggravating circumstance of an eleven year old killing. As the aggravating circumstance specified in count one of the indictment was not too remote in time to be used against appellant, the fifth assignment of error is overruled.

For his sixth assignment of error, appellant argues that "The court erred in imposing the death penalty as the court found as aggravating (circumstances) factors not listed in the Ohio Revised Code and factors which were improper for consideration under the Ohio Revised Code."

R.C. 2929.03(F) provides:

> "The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. ***"

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At the conclusion of the sentencing phase, and pursuant to R.C. 2929.03(F), the three judge panel made the following specific findings:

> "***
> "We find the following aggravated circumstances have been proven beyond a reasonable doubt:
> "1) The manner by which the Defendant purchased the gun, used to kill the victim in this case.
> "2) The manner by which the Defendant purchased the ammunition for the gun.
> "3) The shooting of the victim, the firing at close range and finally placing the gun almost against her skull and discharging the weapon.
> "4) The prior purposeful killing of his wife in 1970 by multiple stab wounds.
> "5) Committing the present offense while on parole for the murder of his wife.
> "***"

The purpose of the eight statutory aggravating circumstances listed in R.C. 2929.04(A) is to limit the discretion of the sentencing body. They objectively narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on particular defendants as compared to others found guilty of aggravated murder. We agree with appellant that the trial court's consideration of non-statutory aggravating circumstances was improper under Godfrey v. Georgia, supra.

There remains, however, the question of whether our conclusion in this regard necessitates that appellant be resentenced. In Zant v. Stephens (1983), 462 U.S. 862, the Georgia Supreme Court had struck down as unconstitutionally vague one of three

aggravating circumstances considered by the jury in the defendant's capital trial. Despite this action, the Georgia court concluded that resentencing was not required. Upon review, the United States Supreme Court affirmed. The evidence which supported the defective aggravating circumstance, absent its designation as an aggravating circumstance, was otherwise admissible and the Georgia Supreme Court had reviewed the sentence in order to guard against arbitrariness and to assure proportionality. See, also, the fifth paragraph of the syllabus in Jenkins, supra, wherein the Ohio Supreme Court held: "In the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing. Should this merging of aggravating circumstances take place upon appellate review of a death sentence, resentencing is not automatically required where the reviewing court independently determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and that the jury's consideration of duplicative aggravating circumstances in the penalty phase did not affect the verdict."

As in Zant and Jenkins, the evidence supporting the non-statutory aggravating circumstances considered by the court below was clearly admissible. Additionally, and again as in Zant and Jenkins, R.C. 2929.05(A) requires this court to make independent

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findings when the death sentence is imposed. Specifically, R.C. 2929.05, entitled "Appellate review of death sentence," provides:

> "(A) Whenever sentence of death is imposed ***, the court of appeals *** shall upon appeal review the sentence of death at the same time that [it] review[s] the other issues in the case. The court of appeals *** shall review the judgment in the case and the sentence of death imposed by the *** panel of three judges in the same manner that [it] review[s] other criminal cases, except that [it] shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case ***. [The court of appeals] shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances *** the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals *** shall affirm a sentence of death only if [it] is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case ***."

It is our conclusion that although the trial court improperly considered non-statutory aggravating circumstances, this does not require that appellant's sentence be set aside. "Any *** possibility of error that this had upon the [three judge panel's] judgment can be guarded against when this court undertakes its responsibility *** to weigh all of the evidence and determine whether the remaining *** aggravating circumstance

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which appellant was found guilty of committing outweigh[s] the mitigating factors present in this case." Jenkins, supra, at pp. 199-200. The sixth assignment of error is overruled.

Appellant also contends, by his seventh assignment of error, that "Under the proportionality review required to be done by this court, the penalty imposed upon Von Clark Davis is out of proportion to the other sentences given for similar crimes in this county." We disagree.

R.C. 2929.05(A) further provides as follows:

> "Whenever sentence of death is imposed ***, the court of appeals *** shall review the judgment in the case and the sentence of death imposed by the *** panel of three judges in the same manner that (it) review(s) other criminal cases, except that (it) shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine *** whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals *** shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *** The court of appeals *** shall affirm a sentence of death only if (it) is persuaded from the record *** that the sentence of death is the appropriate sentence in the case."

Based on the record and the evidence, it is this court's opinion that the death penalty is appropriate in the case sub judice and is not excessive or disproportionate to the penalty imposed in similar cases. State v. Russell (Dec. 30, 1985), Clermont App. No. CA84-01-001, unreported; State v. Pierce (Mar.

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17, 1986), Butler App. No. CA84-10-125, unreported; Jenkins, supra; Maurer, supra; Mapes, supra; Martin, supra; Buell, supra. Appellant's seventh assignment of error is overruled.

We now undertake the task of independently weighing the aggravating circumstances against any mitigating factors. Despite the trial court's consideration of non-statutory criteria (see the sixth assignment of error, supra), one aggravating circumstance remains: prior to the offense at bar, appellant was convicted of second degree murder, an offense an essential element of which was the purposeful killing of another.[8]

Based upon the evidence adduced at the sentencing hearing, the three judge panel specifically enumerated and considered the following factors in mitigation:

> "1) The Defendant adjusted well to prison routine and during his stay in prison, obtained a high school GED and an associate degree in Business Administration, and studied for and worked as a dental technician.
> "2) There has always been a good family relationship between the Defendant and all members of his family, including his step father.
> "3) Since his release on parole, he has maintained at least partial employment.
> "4) As testified by the psychologist, Defendant has a compulsory personality disorder or explosive disorder which may have contributed to the violence in this case."

These factors, which fail to exemplify the factors set forth in R.C. 2929.04(B)(1) through (B)(6),[9] in no way excuse appellant's culpability in two murders. While he suffered from

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personality disorders, appellant did not lack substantial capacity to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct. Rather, the murder of Suzette Butler was knowingly and deliberately accomplished. After careful consideration of the record, we can only conclude that the aggravating circumstance of this case outweighs the above R.C. 2929.04(B)(7) mitigating factors beyond a reasonable doubt. That the three judge panel considered non-statutory aggravating circumstances in the penalty phase did not affect the sentence herein.

Appellant's claims have all been discussed and rejected. Accordingly, we affirm the conviction and sentence of death in this case.

Judgment affirmed.

HENDRICKSON, P.J., and JONES, J., concur.

---

[1] Additionally, we note the following testimony wherein Coleman identified appellant's stated rationale for desiring a gun:

> "***
>
> "Q. (by the prosecuting attorney). *** Did Mr. Davis have an occasion to discuss with you why he needed to have a gun?
>
> "A. (by Coleman). No more than he wanted for protection."

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[2] R.C. 2903.01 provides:

> "(A) No person shall purposely, and with prior calculation and design, cause the death of another."

[3] In pertinent part, R.C. 2929.04 provides:

> "(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
> "***
> "(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course cf conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
> "***"

[4] In pertinent part, R.C. 2923.13, entitled "Having weapons while under disability," provides:

> "(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
> "***
> "(2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;
> "***"

[5] I.e., Furman v. Georgia (1972), 408 U.S. 238.

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[6] In pertinent part, R.C. 2929.04, entitled "Criteria for imposing death or imprisonment for a capital offense," provides:

> "(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
> "(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
> "(2) The offense was committed for hire.
> "(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
> "(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.
> "(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
> "(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the

J 20 P 814

offender's specific purpose to kill a peace officer.

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

"(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding."

[7] We note the case of State v. Dunkins (1983), 10 Ohio App. 3d 72, wherein it was held that:

"The law favors joinder for public policy reasons, such as: to conserve judicial economy and prosecutorial time; to conserve public funds by avoiding duplication inherent in multiple trials; to diminish the inconvenience to public authorities and witnesses; to promptly bring to trial those accused of a crime; and to minimize the possibility of incongruous results that can occur in successive trials before different juries."

[8] In accordance with the mandate of R.C. 2929.05(A), we note our conclusion that the evidence supports the panel's finding of this aggravated circumstance.

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[9] The R.C. 2929.04 criteria for imposing death or imprisonment for a capital offense are as follows:

> "(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, *** the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
>
> "(1) Whether the victim of the offense induced or facilitated it;
>
> "(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
>
> "(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
>
> "(4) The youth of the offender;
>
> "(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
>
> "(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
>
> "(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

J 20 P 816

COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
BUTLER COUNTY, OHIO

Copy

STATE OF OHIO	*	Case No. CA84-06-071
Plaintiff-Appellee	*	
vs.	*	NOTICE OF APPEAL
VON CLARK DAVIS	*	
Defendant-Appellant	*	86-1171

* * * * * * * * * * * *

Now comes the Defendant-Appellant and hereby gives notice of his appeal to the SUPREME COURT OF OHIO from an Opinion and Judgment Entry of the Court of Appeals, Twelfth Appellate District, Butler County, Ohio, entered on May 27, 1986, that the case does involve a substantial constitutional question, that the case did not originate in the Court of Appeals, and that the case is of great public and general interest.

FILED in Court of Appeals
BUTLER COUNTY, OHIO
JUN 23 1986
EDWARD S. ROBB, JR
CLERK

HOLBROCK & JONSON LAW FIRM
Attorneys for Appellant
315 S. Monument Avenue
Hamilton, OH 45011
Telephone: 868-7600

By: Timothy R. Evans
Timothy R. Evans

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was forwarded by ordinary U.S. Mail to Mr. John Holcomb, Prosecuting Attorney, Butler County Courthouse, Hamilton, OH 45011, this 23rd day of June, 1986.

By: Timothy R. Evans
Timothy R. Evans

FILED
JUL 23 1986
SUPREME COURT OF OHIO
JAMES Wm. KELLY, Clerk

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BOX 687
N, OHIO 45012

MDS:ljs
9/29/88

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

STATE OF OHIO	*	Case No.: CR83-12-0614
		CA84-04-071
Plaintiff	*	86-1171
vs.	*	MOTION TO RETURN DEFENDANT FOR SENTENCING
VON CLARK DAVIS	*	
Defendant	*	

* * * * * * * * * *

Now comes John A. Garretson, Michael D. Shanks and Timothy R. Evans as attorneys on behalf of Defendant, Von Clark Davis, and moves the Court for an order returning Defendant from the Ohio Correctional Facility, Lucasville, Ohio, to the custody of the sheriff of Butler County, Ohio, pending a resentencing hearing in the above captioned matter.

M E M O R A N D U M

The Supreme Court of Ohio in a recent publicized opinion has set aside the opposition of the death penalty in the above captioned case and has remanded the matter back to the trial court for resentencing pursuant to the dictates of the opinion. At the present time, Defendant, Von Clark Davis, remains on death row at the Ohio Correctional Facility in Lucasville, Ohio. Since the matter is to be rescheduled for sentencing it is imperative that the Defendant be returned as soon as practical to the custody of the Sheriff of Butler County, Ohio, so that the legal and factual issues can be properly reviewed with Defendant and counsel and further that counsel can adequately prepare for the sentencing hearing as

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mandated by the Supreme Court. Therefore, it is respectfully requested that the Court issue an order requiring the Ohio Department of Corrections to return Von Clark Davis to the custody of the Sheriff of Butler County, Ohio, pending further matters.

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By: Timothy R. Evans (mp)
Timothy R. Evans

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing Motion was hand-delivered to John A. Holcomb, Prosecuting Attorney, 216 Society Bank Building, Hamilton, Ohio, on this 21st day of Sept., 1988.

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John A. Garretson

By: Michael D. Shanks
Michael D. Shanks

By: Timothy R. Evans
Timothy R. Evans

IMAGED

IN THE COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

FILED
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CLERK OF COURTS
EDWARD S. ROBB. JR.

FILED In Common Pleas Court
BUTLER COUNTY, OHIO
APR 7 1992
EDWARD S. ROBB, JR.
CLERK

Received from the Common Pleas Court of Butler County, Ohio, this 7th day of April, 1992 the following items used as Exhibits in Case No. CA84-06-0071

State of Ohio
-vs-
Von Clark Davis

Photos State Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 & 12, 13, 15, 16, 17, 18, 19 & 26

State Exhibit 2 - 4-25 cal cartridge case

State Exhibit 1 - 4 bullets

Jay Echert
~~Bailiff~~ Supervisor C.P.C. Clerk

Mary L. Swain
~~Attorney~~ Secretary
Recipient

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